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PR Docket No. 93-144  
RM-8117, RM-8030  
RM-8029

PP Docket No. 93-253

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### Summary of the Argument

The staff's proposal to auction the 800 MHz band is not feasible. The plan has not been adequately thought out and does not take into account the reality that congestion in the 800 MHz band prohibits the Commission from auctioning clear, unlicensed spectrum. Further, the Commission's conclusions regarding auction of the 800 MHz band are not supported by the evidence in the record and should not be acted upon.

In the alternative, the Commission and Congress should consider a program authorizing the implementation of "spectrum rents" which would avoid the egregious "taking of property" now contemplated by the staff.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to Facilitate	)	PR Docket No. 93-144
Future Development of SMR Systems	)	RM-8117, RM-8030
in the 800 MHz Frequency Band	)	RM-8029
	)	
and	)	
	)	
Implementation of Section 309(j)	)	
in the Communications Act -	)	PP Docket No. 93-253
Competitive Bidding	)	
800 MHz SMR	)	

**Ex Parte Comments of Small Business SMR Licensees**

Mobex Communications, Inc. ("Mobex") and the Commenters listed in attached Exhibit "A", (collectively "Commenters") by their attorneys and pursuant to Section 1.1206 of the Commission's rules, hereby submit ex parte comments in the above proceeding.

On September 18, 1995, pursuant to public notice, the FCC staff held a meeting with interested members of the public, in which the staff set out its recommendations to the Commission to resolve this proceeding. The staff invited interested parties to file responding ex parte comments by September 29, 1995. The following is the Commenters' response.

## I. The SMR Systems

All of the Commenters operate 800 MHz SMR systems in various parts of the country, including Idaho, Oregon, Washington, Texas, North Carolina and South Carolina. Many are affiliated with the WPCS Coalition in Washington, Idaho, and Oregon, which is providing wide-area roaming capability to its SMR customers. Mobex also provides wide area coverage to its customers in East Texas.

The Commenters' operations have been very successful, competing effectively with other cellular and SMR providers because the Commenters can offer low-cost services to fleet customers desiring both dispatch and interconnect service from a single, efficient, wide-area tower coverage.

Mobex's Operations. Through its subsidiaries Mobex operates a 185-channel system in the Boise, ID BEA #150. In the Boise BEA, Mobex operates<sup>1/</sup> 116 of the top 200 channels in the 861-866 MHz band, and 55 of the 80 lower SMR channels located in the shared pool band, 854-861 MHz. No entity winning the auction in Boise would have sufficient channel capacity to relocate Mobex to new channels in that market. As one of the largest independent operators in the country, Mobex's highly successful Boise operations are threatened by the FCC's proposed rules.

Mobex operates another significant SMR system in East Texas/Northwest Louisiana, in the eastern section of the Dallas,

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<sup>1/</sup> Mobex operates most of these channels directly, and some through management agreements.

TX BEA # 127. Mobex, directly or under management agreements, operates approximately 142 channels in the upper 200 channel SMR block (861-865 MHz) and another 36 channels in the 856-860 MHz band in East Texas. In addition, two other major operators and additional smaller users operate in the upper 200 channel block in the Dallas BEA.

There is insufficient channel capacity available for an auction winner in the Dallas BEA to relocate all users, or even Mobex's operation, in that BEA.

The FCC's proposal to freeze existing licensees in place would relegate incumbents to smaller geographic service areas than their competitors, thus creating "second class" licenses. Right now, all licensees operate under the same geographic service rules. In the future, there would be two definitions of market coverage - transmitter based smaller service areas for incumbents, and BEA geographic markets for operators.

Everyone connected with this docket, including the staff, knows full well there is no spectrum to auction at 800 MHz because it already is substantially licensed. The FCC is not holding spectrum auctions; it is holding a land auction - the right of a licensee to use a frequency, if it can find it, buy it, or obtain it through incumbent default, in a larger geographic market than its incumbent competitors. The fact that the FCC is proposing to freeze existing operators into smaller

and ever-shrinking service areas, is exactly the advantage the FCC is auctioning to competitors -- geography, not spectrum.

The FCC is proposing that the Commenters either buy back their own investment in the development of these licensed frequencies, or that the FCC sell the Commenters' developed good will in these frequencies to others in order to enrich the Federal coffers, which is itself a taking of property rights in the value of its developed business, i.e., the proceeds from the sale of these licenses.

## II. Staff Proposal Is Not Feasible.

The staff has proposed to auction a highly congested band of 800 MHz spectrum currently licensed throughout the country to existing SMR licensees. Never before has the Commission proposed to auction such a congested, already fully licensed band of spectrum; neither the PCS nor 900 MHz SMR auction proceedings, which involved essentially vacant but some partially licensed bands, raised such overwhelming relocation issues for a maturely licensed and operating band.

As a result, the staff cannot support through record evidence, as opposed to theories propounded by those few who would gain from auctions, that the FCC in fact can lawfully or practically auction off spectrum it already has licensed to the public.

The evidence is that the band 861-866 MHz, and its corresponding mobile frequencies, already are licensed throughout the United States, with virtually no "white space" left for new

licensees. The FCC must displace existing licensees, relocate them, or force these licensees to bid for frequencies they already have licensed.

### III. Comparable Service Must Include Geographic Competitiveness

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The staff asked for further input on the issue of "comparable service". The Commenters address the question in two facets - comparable frequencies, and comparable, competitive geographic service areas.

Comparability regarding frequencies involves, at minimum, the following: 800 Mhz frequencies of comparable bandwidth (25 KHz) which can be located at the same tower site with the same operating parameters (height, power, ERP, effective coverage) as the frequencies being replaced. The substitute frequency must receive the same protection from co-channel spacing as the original frequency, i.e., if the replacement frequency has a co-channel short-spaced to it, and the original frequency does not, then the replacement frequency is not comparable, and would not be a basis for forcing an incumbent off the original frequency. There could be no short-spacing after the move, and no wide-area short spacing if the original frequency was not subject to constructed and operating wide area co-channel construction at the date of adoption of the rule making herein.

Any comparable service plan must include geographic market parity to the incumbent. The theory that "the FCC won't



permit incumbents to expand now" overlooks the fact that the Commission is proposing to create unfair competition by creating two definitions of spectrum exclusivity in each market -a superior BEA geographic market for auction winners, and an inferior, facilities-based geographic market for incumbents.

This proposal has nothing to do with auctioning spectrum (since there is none to auction) but instead involves the Commission in bureaucratically determining economic winners and losers, based on a narrow, pre-determined economic theory of who should win or lose. The Commission does not create regulatory parity; it dictates marketplace inequalities.

One-for-one spectrum swaps not only are insufficient; the FCC does not even require that this minimum relocation be provided to licensees. The proposed FCC plan encourages an auction winner not to relocate his major competitor, but instead let him freeze to death economically within his smaller geographic service area. That way, the auction winner saves the substantial costs of relocation, and permits his competition to wither away over the first five years of the license term under the FCC's confining, inferior market plans for incumbents.<sup>2/</sup>

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<sup>2/</sup> The auction winner, meanwhile, can meet the FCC's construction requirements with truly minimal construction. In the Boise BEA, for instance, the 3-year, 1/3 population coverage, and 5 year, 2/3 population coverage standard can be met by constructing a few tower sites serving the Boise metropolitan area. Thus, the auction winner can make a minimal investment in the first 5 years, not incur relocation costs, pick off the smaller operators, and restrict the growth of his major SMR competition while he consolidates his market entry strategy. The  
(continued...)

BEA parity for all incumbents must be required.

Otherwise, the competition between incumbents and auction winners is unfairly skewed to favor the auction winner with the larger geographic market. Certainly, this requires more work on the Commission's part, and a specific spectrum set-aside to ensure a fair and effective relocation plan. So far, the Commission has been willing to propose one-way mandatory relocation theory, but unwilling to identify and require the set-aside of sufficient relocation spectrum for all incumbents.<sup>2/</sup>

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<sup>2/</sup>(...continued)

staff needs to require substantial construction on substantial percentages of the auctioned spectrum within the 3-and 5-year benchmarks. Mobex suggests that 50% of the channels purchased must be constructed and operating within 3 years, and 75% within 5 years, in addition to meeting the population coverage requirements. In the alternative, Mobex proposes that the auction winner would be required to construct on 50% of all frequencies at some point in its BEA market within 3 years, and 100% within 5 years, forfeiting those it did not construct at the end of five years. If at the end of five years there remain incumbents who had not been relocated, the licensee would be required to apply unconstructed frequencies to relocation of those incumbents.

<sup>3/</sup> As previously discussed in other comments, "one-way mandatory relocation" refers to the Commission proposal to leave solely to the private whims of the auction winner the decision on whether to relocate incumbent licensees to other spectrum. The Commission's proposed mandatory relocation in fact requires the auction winner to do nothing, if he so chooses.

#### IV. Confining Incumbents to the 40 dBu Contour Unfairly Reduces Existing Service to the Public

The FCC has proposed, and actually implemented for 900 MHz, confining incumbents within their 40 dBu contour and permitting short-spacing under the current short-spacing tables. 40 dBu exclusivity limits and short-spacing raise battle lines of major proportions.

In the Boise BEA, typical of the mountainous Northwest, effective coverage for existing customers extends beyond the 22 dBu contour. Even co-channel licensees located greater than 75 miles from Mobex's Boise operations have, in the past, voluntarily relocated to other frequencies in order to avoid unacceptable interference to both Mobex and the co-channel user.

Protecting incumbent 800 MHz SMR operators only to the 40 dBu contour, and permitting auction winners to build short-spaced towers within 55 miles of existing operations in Idaho or East Texas, for instance, will reduce by half or more the effective service to existing customers in those areas.

The minimum protection for incumbents must be to the 22 dBu contour, coupled with elimination of the current short-spacing table.<sup>4/</sup> This does not ensure competitive equality with the auction winner;<sup>5/</sup> geographic market parity also is necessary.

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<sup>4/</sup> Section 90.621 (b) (4) (ii) (C) (Table).

<sup>5/</sup> As already indicated, the FCC is auctioning a geographic competitive advantage - that, and not spectrum, is what makes the current auction scheme attractive to those intent on cornering the market on 800 MHz SMR spectrum.

The Commenters do not intend to imply herein that protection to the 22 dBu contour and elimination of short spacing to incumbents, standing alone, cures the auction plan defects. It only eliminates the most egregious attempts to eliminate effective competition from incumbents.

V. The Ability to Grow Is Essential to Any Proposal to "Protect" Incumbents

The FCC wishes to encourage competition between incumbents and auction winners, we assume.<sup>6/</sup> If encouraging incumbent competition and low-cost public service are worthy public goals, the Commission must seriously examine the impact of its proposal on the availability of existing financial resources to incumbents if such incumbents are "frozen" in place, whether it be within the 40 dBu or 22 dBu contour. If incumbents do not have the same market expansion potential as the auction winner<sup>7/</sup>, what is the likely availability of financing for system expansion? The Commenters respectfully submit that this proposal would reduce the availability of financial resources to incumbent

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<sup>6/</sup> Another, more unacceptable possibility, is that the FCC is seeking to encourage only competition between the auction winner and current cellular service providers, and is not interested in preserving competition from existing small business licensees.

<sup>7/</sup> Recognizing that incumbents have invested as much or more in constructing and operating their current businesses than the FCC will realize from the auctions. See EMCI's economic analysis, attached to SMR WON's comments in this docket.

licensees. This is a significant economic concern to small businesses.

VI. There is No Relocation Plan.

The relocation theories developed in PCS, 900 MHz SMR, or elsewhere simply do not work for the more crowded and mature 800 MHz SMR industry. Rolling dislocations, direct and indirect impact on the adjacent Industrial Pool and General Category Bands, proposed freezes, internal inconsistencies between the staff proposals to simultaneously use the General Category frequencies for relocation, and subsequently to auction those frequencies, delineate just what a messy, unkempt, poorly constructed, hasty, "auction-at-all-costs" plan this is.

This is New Age Economic Theory without supporting fact. Relocation is "mandatory", but not required. Incumbents are "protected" and have the "right" to be "confined" to smaller contours than their presently effective service areas. There are no good Commission studies which support the staff proposition, expressed on September 18, that relocation is "feasible." Mobex alone has identified two markets where it is not. The FCC's relocation plan is "feasible" only because relocation is not required, either where relocation frequencies are unavailable or for any other reason!!

If the goal is truly to "clear" the upper blocks, then a relocation plan which ensures that all incumbents will be relocated must be developed. Otherwise, auction winners are

purchasing the unfettered license and right to engage in predatory competitive strategies because the FCC desires to eliminate, or has no interest in preserving, incumbent small business investment and competition in the 800 MHz band.

Since there is little or no spectrum to auction, what is being auctioned is the right to take the value incumbents have realized by creating and operating their communications business. This auction proposal amounts to an unconstitutional "taking" of the incumbent's property rights in the proceeds from the sale of the business.

VII. Spectrum Rentals Will Preserve Existing Public Interest Benefits While Raising Money For the U.S. Treasury.

As an alternative, the Commission and the Congress should consider implementing a system of "spectrum rents" in the SMR bands, such rent to be paid by the incumbent license holder in annual installments over the license term. This approach would be preferable to an auction system where businesses lawfully licensed prior to 1993, with full rights to renewal expectancy on existing frequencies, are displaced. It would also avoid difficult constitutional law suits over the "taking of property."

In recent discussions with the staff, it was suggested that a fully developed "spectrum rental" alternative would have to be presented now, because this proceeding was on a fast track to raise auction dollars next year. The economic models and past

auction experience are available to permit analysis of the spectrum rental values over a ten-year license term. It is respectfully suggested that the existing auction proposal is not itself a fully developed plan based on this record, nor is it authorized by Congress under existing auction legislation.

Many Senators and Congressmen have warned the FCC in letters that the auction of the already licensed 800 MHz band was not authorized by the 1993 auction legislation. Unfortunate as it may seem to the Commission, the drive for dollars now may have to be tempered by sound management of existing licensed service, respect for existing, embedded investment, low-cost competition from small business, and acknowledgement that such investment must be permitted to grow to avoid economic waste.

Based on the foregoing, the Commenters respectfully submit that the staff proposal is seriously flawed, is

unsupported by the record herein, is unlawful, and unwise. It requires significant restudy and reworking.

Respectfully submitted,

Mobex Communications, Inc.  
Radio Service Company  
Earl's Wireless Communications  
Business Radio, Inc.  
Zundel's Radio, Inc.

by: Raymond J. Kimball  
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Its Counsel

Dated: September 29, 1995

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**EXHIBIT A**

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